(2)
FILED
FEB 9 1998
OFFICE OF THE CLERK

No. 97-952

In the Supreme Court of the United States

OCTOBER TERM, 1997

PACE INDUSTRIES, INC., D/B/A
PRECISION INDUSTRIES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

35 pp

QUESTION PRESENTED

The National Labor Relations Board found that petitioner, a successor employer, unlawfully engaged in discriminatory hiring practices to avoid incurring a legal obligation to recognize and bargain with the union that represented its predecessor's employees. The question presented is whether the Board acted within its remedial authority in ordering petitioner to recognize and bargain with the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Be-Lo Stores v. *NLRB*, 126 F.3d 268 (4th Cir. 1997)	16, 18
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	11, 15
Elastic Stop Nut Div. of Harvard Indus. v. *NLRB*, 921 F.2d 1275 (D.C. Cir. 1990)	2
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	2, 13
Howard Johnson Co. v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249 (1974)	2
International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276 (1975)	10
Kungys v. *United States*, 485 U.S. 759 (1988)	11
Lee Lumber & Bldg. Material Corp. v. *NLRB*, 117 F.3d 1454 (D.C. Cir. 1997)	16
Marshall Field & Co. v. *NLRB*, 318 U.S. 253 (1943)	10
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984)	11
NLRB v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972)	2
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	11, 16, 17
NLRB v. *Gordon*, 792 F.2d 29 (2d Cir.), cert. denied, 479 U.S. 931 (1986)	18
NLRB v. *Horizons Hotel Corp.*, 49 F.3d 795 (1st Cir. 1995)	2

Cases—Continued: Page

NLRB v. *LaVerdiere's Enters.*, 933 F.2d 1045 (1st Cir. 1991) 16
NLRB v. *Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983) 16
NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953) 10
NLRB v. *So-Lo Foods, Inc.*, 985 F.2d 123 (4th Cir. 1992) 11
NLRB v. *Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992) 15
New Breed Leasing Corp., 317 N.L.R.B. 1011 (1995), enforced, 111 F.3d 1460 (9th Cir.), cert. denied, 118 S. Ct. 366 (1997) 3
Peoples Gas System, Inc. v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980) 11
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 8
Pioneer Inn Assocs., 228 N.L.R.B. 1263 (1977), enforced, 578 F.2d 835 (9th Cir. 1978) 13
Red Oaks Nursing Home, Inc. v. *NLRB*, 633 F.2d 503 (7th Cir. 1980) 16
Texas Petrochemicals Corp. v. *NLRB*, 923 F.2d 398 (5th Cir. 1991) 16
U.S. Marine Corp., 293 N.L.R.B. 669 (1989), enforced, 944 F.2d 1305 (7th Cir. 1991), cert. denied, 503 U.S. 936 (1992) 3
Virginia Elec. & Power Co. v. *NLRB*, 319 U.S. 533 (1943) 19
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 10
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 12

Statutes and regulation: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 5
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 5
§ 8(a)(5), 29 U.S.C. 158(a)(5) 2, 5
§ 10(e), 29 U.S.C. 160(e) 9, 10
29 C.F.R. 102.48(d)(1) 10

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-952

PACE INDUSTRIES, INC., D/B/A
PRECISION INDUSTRIES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 118 F.3d 585. The decision and order of the National Labor Relations Board (Pet. App. A18-A28), and the decision of the administrative law judge (Pet. App. A28-A206), are reported at 320 N.L.R.B. 661.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1997. A petition for rehearing was denied on September 8, 1997. Pet. App. A207. The petition for a writ of certiorari was filed on December 8, 1997

(a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is settled law that, where there is "substantial continuity" between the business enterprises of a previous employer and a new employer, the new employer is a "successor" to the old employer. A successor employer is obligated by Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), to recognize and bargain with the union that represented its predecessor's employees, if a majority of the successor's workforce formerly was employed by its predecessor.[1]

Although a successor employer is not legally obligated to hire its predecessor's employees, refusing to hire those former employees for the purpose of avoiding the obligation to recognize and bargain with the union violates Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[2] A successor employer that engages in such unlawful hiring discrimination against the predecessor's employees also violates Section 8(a)(5) if it refuses to recognize and bargain with the union that represented the predecessor's employees.[3]

The remedies for such violations are well established. The "appropriate remedy" for failure to bar-

---

[1] See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41, 43 (1987); *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280-281 & n.4. (1972).

[2] *Fall River*, 482 U.S. at 40; *Burns*, 272 U.S. at 280-281 & n.5. See also *Howard Johnson Co.* v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249, 261-262 & n.8 (1974).

[3] See, *e.g.*, *NLRB* v. *Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *Elastic Stop Nut Div. of Harvard Indus.* v. *NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990).

gain generally consists of "restoration of the previously existing employment terms, the *status quo ante*," and enforcement of the "obligation to bargain" before new changes can be made.[4] Similarly, where a successor has engaged in unlawful hiring discrimination to avoid its bargaining obligation, the Board acts within its remedial authority in ordering the successor to recognize and bargain with the union, and to rescind unilateral changes in employment terms pending good-faith negotiations with the union or an impasse in bargaining.[5]

2. Petitioner Pace Industries, Inc., d/b/a Precision Industries, Inc., manufactures aluminum die castings. Pet. App. A2, A44.[6] In October 1988, petitioner purchased from Universal Die Casting, Inc. (UDC) two plants in Arkansas, one in Little Rock and the other in Malvern. *Id.* at A2, A38, A46. At the time of the purchase, the International Union, United Automo-

---

[4] *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1322 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992). See also *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460, 1467-1469 (9th Cir.), cert. denied, 118 S. Ct. 366 (1997).

[5] See, *e.g.*, *New Breed Leasing Corp.*, 317 N.L.R.B. 1011, 1011 & n.3, 1027 (1995), enforced, 111 F.3d 1460 (9th Cir.), cert. denied, 118 S. Ct. 366 (1997); *U.S. Marine Corp.*, 293 N.L.R.B. 669, 672, 673 (1989), enforced, 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992).

[6] In addition to Pace Industries, Inc., d/b/a Precision Industries, Inc., two other entities are named as petitioners: Pace Industries, Inc., d/b/a General Precision Tool & Die, Inc., and Pace Industries, Inc., d/b/a Automatic Castings, Inc. See Pet. 1. Because these three entities constitute a single employer for purposes of the National Labor Relations Act (Pet. App. A194), and because the nominal distinctions among them ~~is~~ are of no material significance here, we refer to the three entities, collectively, as "petitioner."

bile, Aerospace and Agricultural Implement Workers of America (Union) represented a bargaining unit consisting of all production and maintenance employees at UDC's Malvern plant. *Id.* at A2, A38, A194. UDC and the Union previously had negotiated a three-year collective-bargaining agreement, effective through May 6, 1989. *Id.* at A39. The employees at UDC's Little Rock plant, however, were not represented by a union. *Id.* at A2.

On October 14, 1988, UDC ceased operations at the Malvern plant and discharged the employees. Pet. App. A3, A47. Petitioner, as the new owner of the plant, then solicited job applications from the general public, requiring UDC's former Malvern employees to submit applications if they wished to continue their employment at the plant. *Id.* at A3, A160. To restaff the Malvern plant, petitioner, at a cost of about $100,000, implemented an elaborate hiring procedure, interrupting production and jeopardizing commitments to customers. *Id.* at A3. The hiring process, which took six to eight weeks to complete, required applicants to submit to various aptitude tests, skills tests, and a physical examination, including a back x-ray. *Id.* at A3-A5, A161, A163, A165-A168, A173. Although 103 of UDC's former Malvern employees submitted applications, petitioner hired only 22 of them, a numerical minority of its workforce at the Malvern plant. *Id.* at A6, A24, A47, A163.

By contrast, the non-union Little Rock plant did not close for restaffing; instead, petitioner vested the plant manager with complete discretion in deciding whom to hire. With virtually no review of their applications, and without requiring any testing or physical examination, the plant manager hired almost all of UDC's former Little Rock employees, based on

his personal knowledge of the applicants. Pet. App. A3, A5, A161. On and after October 14, petitioner unilaterally altered the employment terms of the employees in the Malvern bargaining unit without prior notice to or bargaining with the Union. *Id.* at A193, A195.

3. On May 25, 1989, acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. A29. As later amended, the complaint alleged that, in violation of Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), petitioner had discriminatorily refused to hire former UDC employees at the Malvern plant because they were represented by the Union, had refused to recognize and bargain with the Union as the representative of the employees in the Malvern bargaining unit, and had unilaterally altered the Malvern employees' terms and conditions of employment without bargaining with the Union. Pet. App. A29-A30, A32.

The litigation that followed was protracted. Although a hearing was originally scheduled for November 13, 1989 (Pet. App. A31), the parties were unable to agree on the terms of a protective order, and the hearing was adjourned to permit the General Counsel to pursue a subpoena enforcement action against petitioner in federal district court. *Ibid.* After the entry of a consent decree by the district court and the General Counsel's review of the subpoenaed material, the General Counsel filed an amended complaint on June 22, 1990. *Id.* at A32. From September 17, 1990, to November 19, 1991, the administrative law judge (ALJ) took 15 solid weeks of testimony, producing a transcript of 13,000 pages. *Id.* at A33. After review of what concededly had become a "monumental" record

(*id.* at A36), the parties submitted briefs to the ALJ on October 5, 1992.

a. On May 4, 1993, the ALJ issued a decision, finding that petitioner had violated the Act, as alleged. Pet. App. A29-A206. The ALJ concluded that petitioner was a successor employer to UDC, in that there was "substantial continuity" between petitioner's operations and those of UDC at the Malvern plant. *Id.* at A190. Accordingly, petitioner was under a duty not to avoid its obligation to bargain with the union by discriminating against former employees. Yet the ALJ found that petitioner had done precisely that: "[T]he purpose of the Malvern screening procedure," the ALJ found, "was to get rid of the Union," and "the proffered business reasons for the Malvern screening process were totally false and pretextual." *Id.* at 179; see also *id.* at A182-A183. Although petitioner had attempted to mask its purpose with an elaborate screening procedure, the net effect was that petitioner had "refused to hire * * * 62 former Malvern UDC employees because they had been represented by the Union, and [because] their hiring by [petitioner] was feared to have necessitated recognition and bargaining with the Union." *Id.* at A186.[7]

---

[7] The anti-union motivation was evident not merely from the fact that screening procedures were imposed at the union plant in Malvern but not the non-union plant in Little Rock, but also from the manner in which the screening process operated. Former workers at the Malvern plant were rejected for omissions in their applications even though new hires had similar omissions in their applications (Pet. App. A12, A164-165), other reasons for rejecting former employees appeared pretextual (*id.* at A12-A13, A173, A174), and the entire process of testing was set up in a manner that "enabled [petitioner] to

The ALJ further found that, "had it not been for the fear that it might have had to recognize and bargain with the Union, * * * [petitioner] would have continued in place the entire complement of former UDC employees." Pet. App. A189. Addressing the possibility of new hires, the ALJ also concluded that "but for the discriminatory hiring procedure, the Union's presumption of majority status would have continued" among the employees in the Malvern bargaining unit. *Id.* at A191.

Based on these findings, the ALJ concluded that petitioner's refusal to recognize and bargain with the Union, and its unilateral changes to the terms of employment, violated Section 8(a)(1) and (5) of the Act. Pet. App. A192-A193, A195. The ALJ therefore recommended that petitioner reinstate the victims of discriminatory hiring with full backpay (*id.* at A195-A197), and that petitioner be required to recognize and bargain with the Union (*id.* at 197).

b. Petitioner filed 282 objections to the ALJ's findings and conclusions with the Board, and a 100-plus page brief in support of its objections. On January 3, 1996, the Board issued a decision affirming the ALJ's findings and conclusions, with certain modifications that are not relevant here. Pet. App. A18-A28. The Board agreed with the ALJ that, in implementing the hiring procedure at the Malvern plant, "[petitioner's] purpose * * * [was] simply to make sure that former UDC employees did not make up a majority of its work force, and thereby to avoid incurring the duty to recognize and bargain with the Union." *Id.* at A24. The Board adopted the ALJ's

---

arbitrarily control the ratio of UDC and non-UDC applicants hired" (*id.* at A174-A175).

recommended remedial order (*id.* at A19, A27), which requires petitioner to offer reinstatement to specified victims of discrimination; to give them back pay and other make-whole relief; to bargain with the Union as the representative of the employees in the bargaining unit at the Malvern plant; and to rescind the unilateral changes in the terms of employment for the Malvern bargaining unit "until [petitioner] negotiates in good faith with the Union to agreement or to impasse." *Id.* at A199-A201.

4. Petitioner sought judicial review of the Board's order, and the Board cross-petitioned for enforcement. The court of appeals denied the petition for review, and granted the petition for enforcement. Pet. App. A1-A17.

The court concluded that substantial evidence supports the Board's finding that petitioner instituted the hiring procedure at the Malvern plant in order to avoid an obligation to recognize and bargain with the Union. Pet. App. A9, A10-A15. Rejecting petitioner's contention that the remedy fashioned by the Board "exceeds its authority," the court explained that "[t]he goal of a remedial order is to restore 'the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices].'" *Id.* at A15-A16 (quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); bracketed material added by court of appeals). "Ordering [petitioner] to offer reinstatement and backpay to the discriminatees is directly aimed at and fulfills that purpose," the court concluded. *Ibid.*

The court similarly concluded that the remedy of "[r]escinding the unilateral changes in employment conditions likewise comports with the policies of the Act." Pet. App. A16. "In fashioning the order," the

court observed, "the ALJ correctly presumed that without the discriminatory hiring practices the union's majority status would have continued, which in turn would have required that [petitioner] bargain with the union before making changes in employment terms." *Id.* at A16-A17.

ARGUMENT

Before this Court, petitioner does not challenge the Board's findings that petitioner engaged in unfair labor practices. Nor does petitioner question the Board's general remedial authority to require a successor employer, like petitioner, to bargain with the union where, as here, the employer engaged in hiring discrimination in an unlawful attempt to avoid a legal duty to bargain. Rather, petitioner's sole contention (Pet. 5-6) is that the court of appeals should not have enforced the Board's bargaining order in this case because of "changed circumstances" occurring between the closure of the Malvern plant in October 1988 and the court of appeals' issuance of its decision in July 1997. That fact-bound claim was not properly preserved, is without merit, and does not implicate a division in circuit authority. Accordingly, further review is not warranted.

1. As an initial matter, petitioner's claim of "changed circumstances" is jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e). Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). Petitioner did not object to the issuance of a bargaining order on the basis of "changed circumstances" before

the Board at any time prior to the Board's issuance of its January 1996 decision. Nor did petitioner raise such an objection by filing a motion for reconsideration with the Board at any time thereafter. See Pet. App. A18, A27, A200; 29 C.F.R. 102.48(d)(1). Instead, petitioner raised that objection for the first time in the court of appeals (which declined to address it). Pet. App. A15-A17; see also Pet. 3-4. Because petitioner failed to raise its changed circumstances contention before the Board (by motion for reconsideration or otherwise), Section 10(e) precludes this Court—as it precluded the court below—from addressing the argument now. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[8]

---

[8] Petitioner errs in suggesting (Pet. 4 n.2) that Section 10(e)'s jurisdictional bar is inapplicable here because Section 10(e) "is not a limitation on the equity powers of the courts of appeals in determining the appropriateness of a particular remedy." Nothing in the text of Section 10(e) creates an exception for remedial objections. To the contrary, Section 10(e) jurisdictionally bars judicial consideration of any "objection that has not been urged before the Board," language that by its plain terms includes "objections" to the remedy selected. Indeed, this Court has so construed Section 10(e). See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953) (objection to remedy barred by Section 10(e) where objection was not raised before the Board); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). Petitioner also suggests (Pet. 4 n.2) that Section 10(e) is inapplicable to this case because, "by definition, 'changed circumstances' occur subsequent to the Board's action and * * * could not have been presented before the Board." But petitioner effectively concedes that the changed circumstances at issue here arose before the Board issued its decision, since petitioner argues (Pet. 5, 6) that the increase in the size of the Malvern workforce was "largely attributable" to Board

Besides, even if petitioner's "changed circumstances" argument were not jurisdictionally barred, review by this Court would still be unwarranted. Petitioner's "changed circumstances" claim is fact-bound, see *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984), and was addressed by neither the Board nor the court below. See Pet. 3 ("the Court of Appeals failed to address whether the NLRB's bargaining order should be enforced in light of the changed circumstances"). This Court ordinarily does not, and should not, consider a question that was not decided by the court below. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("[W]e do not ordinarily consider questions not specifically passed upon by the lower court."); cf. *Kungys* v. *United States*, 485 U.S 759, 773 n.6 (1988) (plurality opinion) ("it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet

---

delay. See also Pet. 3 (complaining that "[t]he final Board decision was issued * * * nearly seven years after the charge was filed"). Besides, even if the alleged "changed circumstances" arose after the Board issued its decision, they would be of doubtful relevance with respect to the propriety of the Board's bargaining order, and should have been brought before the Board on reconsideration in any event, since the Act vests remedial discretion in the Board rather than the courts. See *NLRB* v. *So-Lo Foods, Inc.*, 985 F.2d 123, 129 (4th Cir. 1992) (court of appeals "will not generally consider evidence of events subsequent to the Board's decision during our review of that decision"); see also *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 48 (D.C. Cir. 1980) (in determining whether to issue a bargaining order pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), "the Board should formulate its remedy in light of * * * the conditions in the bargaining unit at the time it renders its decision").

reviewed by the court of appeals"); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

2. Petitioner's "changed circumstances" argument is not only procedurally barred but substantively meritless as well.

a. In essence, petitioner argues that requiring it to bargain with the union was inappropriate because the composition of the workforce changed substantially after the Malvern plant closed. According to petitioner, the plant had only 35 employees when it closed in October 1988, and has more than 300 employees today. Pet. 5, 8. Both factual premises for petitioner's changed circumstances argument are unsupported by the record.

With respect to petitioner's argument that there were "35 'active' employees" in October 1988, the ALJ correctly rejected that contention as "meaningless." Pet. App. A191. "84 former employee applicants * * * were stipulated to have been employed by UDC on October 14, 1988," *ibid.*, and as many as 103 former Malvern employees applied for jobs with petitioner at the Malvern plant, *id.* at A6.[9]

Petitioner's assertion that the "Malvern plant employed about 300 workers" at the time of the Eighth Circuit's decision (Pet. 5, 8) is similarly unsupported. The record is wholly silent as to the number of employees working at the plant at that time. Hence,

---

[9] Petitioner nowhere explains why the number of "active" workers at the moment of closure—a figure that excludes any worker who was laid off or furloughed even the day before closure—is the most appropriate starting point. Petitioner's unlawful discrimination against former employees was not limited to those workers who were "active" on the last day of operations, but rather extended to all former employees, including those who had previously been laid off.

the factual premises for petitioner's changed circumstances argument are not supported by the record.

b. Even if one were to assume that petitioner employed 300 workers at the Malvern plant at the time of the court of appeals' decision in July 1997—and there is no basis for any such assumption—that purported fact, standing alone, would not require that enforcement of the Board's bargaining order be declined. To the contrary, as the ALJ and the court of appeals noted, but for the discriminatory hiring procedure implemented by petitioner at the Malvern plant in October 1988, the Union would have enjoyed a continued presumption of majority status in the Malvern bargaining unit when the plant reopened. See Pet. App. A16, A191; see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987) (noting that unions are entitled to a "rebuttable presumption of majority support" even where there is a change in employers). That presumption of majority status would have continued notwithstanding increases in the size of the workforce, since new hires are as likely to support the union as old ones. See *Pioneer Inn Assocs.*, 228 N.L.R.B. 1263, 1266 (1977) (noting the rebuttable presumption that "new employees will support the union in the same proportion as those employees with more seniority"), enforced, 578 F.2d 835 (9th Cir. 1978). Thus, the allegedly changed circumstances on which petitioner seeks to rely were themselves a result of petitioner's unlawful discriminatory hiring procedures.[10]

---

[10] Petitioner also complains (see, *e.g.*, Pet. 6) that delays by the Board in resolving this case contributed to the changed circumstances. Much of that delay, however, was caused by petitioner's own litigation tactics. Substantial delays were im-

Accordingly, petitioner's representation as to the size of the Malvern workforce in July 1997 does not constitute a "changed circumstance" that would have rendered a bargaining order inappropriate here.

3. Finally, there is no merit to petitioner's suggestion (Pet. 7-8) that the decision of the court of appeals, by enforcing the Board's bargaining order despite allegedly "changed circumstances," conflicts with the decisions of other circuits.

As petitioner acknowledges (Pet. 3-4), the court of appeals did not address whether "changed circumstances" might render the bargaining order inappro-

---

posed from the outset when petitioner and the General Counsel were unable to negotiate an acceptable confidentiality agreement. As a result of that impasse, the hearing originally scheduled for November 13, 1989, was adjourned so the General Counsel could pursue a subpoena enforcement action against petitioner in federal district court. Pet. App. A31. After the entry of a consent decree by the district court and review of the subpoenaed materials, the General Counsel filed an amended complaint on June 22, 1990. *Id.* at A32. Then, from September 17, 1990, to November 1991, the ALJ took testimony in "[f]ifteen weekly sessions of often intensive, concentrated litigation," which were spread out as an "accommodation with the schedules of all parties." *Id.* at A33. Because the resulting record was "monumental"—the transcript alone spanned 13,000 pages—and because of "the complexity of the factual issues," the parties were granted until October 5, 1992 to file their post-hearing briefs before the ALJ. *Id.* at A36. After reviewing those submissions (including petitioner's 1,000-plus page brief) the ALJ issued his decision on April 4, 1993. *Id.* at A36, A202. On August 5, 1993, petitioner filed 282 exceptions to the ALJ's decision with the Board, and a 140-page brief in support thereof; it filed a reply brief on October 8, 1993. After reviewing the enormous record and the voluminous submissions of the parties, the Board issued its decision about two years and three months later, on January 3, 1996. *Id.* at A18.

priate. See Pet. App. A15-A17. It is thus difficult to see how the court's decision can be inconsistent with the "changed circumstances" decisions of any other circuit. Nor is it at all clear how this case could present an appropriate vehicle for resolving the asserted conflict, especially given the existence of the jurisdictional bar. See pp. 9-11 & n.8; see also *Capital Cities Cable, Inc.*, 467 U.S. at 697 (Court ordinarily will not review issues not expressly adjudicated by the lower court).

Besides, even if the court of appeals had passed on the changed circumstances argument (despite the jurisdictional bar), there still would be no conflict: The cases upon which petitioner relies (Pet. 7) are simply inapposite. For example, in *NLRB* v. *Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992), the court declined to enforce the Board's bargaining order where, "as a result of [the Board's] own delay in deciding the company's appeal," seven years had elapsed between the ALJ's decision and that of the Board. *Id.* at 1142. Here, by contrast, less than two and one-half years elapsed between the ALJ's and the Board's respective decisions (see Pet. App. A18), and that time elapsed not because of the Board's inattentiveness but rather because of the need to review a concededly "monumental" record and the monumental number of exceptions —282 in all—that petitioner placed before the Board. See Pet. App. A36; pp. 7-8, 13 n.10, *supra*. The other cases cited by petitioner (Pet. 7) similarly involved both a significantly greater passage of time than occurred here and additional factors—including

manifest employee desire to *avoid* union representation—not present in this case.[11]

Similarly inapposite are the cases petitioner cites (Pet. 8) as having declined to enforce the Board's bargaining orders based on employee turnover in the bargaining unit. Those cases address so-called *Gissel* orders (see *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)).[12] *Gissel* orders require an employer to recognize and bargain with the union even though the union and the employer have not previously established a relationship recognizing the union as the employees' bargaining representative. Such orders are typically entered after the union loses an election,

---

[11] See *NLRB* v. *LaVerdiere's Enters.*, 933 F.2d 1045, 1053-1056 (1st Cir. 1991) (Pet. 7) (declining to enforce bargaining order where employees were engaged in an "effort to bring about a decertification vote," the employer's unfair labor practices were "insubstantial," and there was an "inordinate delay" of three and one-half years "while the ALJ's decision was on appeal to the Board"); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 403-406 (5th Cir. 1991) (Pet. 7) (staying enforcement of bargaining order and remanding case to Board for a decertification election based on "unreasonable" four year delay between ALJ's and Board's decisions and an employee petition indicating that "a majority of the employees * * * were opposed to union representation"). See also *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997) (Pet. 7) (remanding case to the Board for an explanation of "why an affirmative bargaining order is necessary given the facts of this case," where "[t]his entire incident arose seven years ago, the unfair labor practices in question were relatively slight, and the employees twice indicated that they were unhappy with the Union").

[12] See *Be-Lo Stores* v. *NLRB*, 126 F.3d 268, 274-275, 282-283 (4th Cir. 1997); *NLRB* v. *Marion Rohr Corp.*, 714 F.2d 228, 230-231 (2d Cir. 1983); *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F.2d 503, 507, 510 (7th Cir. 1980).

but the election is invalidated as tainted by the employer's unfair labor practices. If the Board concludes that a new election—because of the lasting effects of the unfair labor practices—cannot be fairly held, the Board may decline to hold a new election. Rather, based on other evidence that a majority of the employees desire union representation, the Board may, under *Gissel*, impose a bargaining order instead: "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." 395 U.S. at 614-615.

Thus, the concern that earlier unfair labor practices may taint a new election and render it unfair will ordinarily justify the imposition of a bargaining order instead. In the context of such *Gissel* bargaining orders, some courts have held that the intervening departure of many of the employees who were subjected to the unfair labor practices is a relevant consideration in determining whether it is possible to hold a fair election, which would obviate the need to rely on less certain means, such as authorization cards, of ascertaining the employees' desires. However, that reasoning cannot apply outside the *Gissel* context where, as here, the union was recognized by the predecessor employer as the bargaining representative of the employees and, absent the unfair labor practices, the union likewise would have been recognized by the successor as well. In such a case, there is no doubt that the employees had duly chosen to be represented by the union, as the result of an election held under the predecessor employer, or an

established bargaining relationship between the predecessor employer and the union, unmistakably attests. In such a situation, the problem of choosing between an election and some less reliable means of ascertaining the employees' desires is not present. The Board thus acts reasonably in reestablishing the state of affairs preceding the unfair labor practices by requiring the successor employer to recognize and bargain with the union, as the successor employer was legally obligated to do absent its unfair labor practices.

Finally, the employee turnover cases upon which petitioner relies are also inapposite because they involve employee turnover that resulted from ordinary attrition. Indeed, in *Be-Lo Stores* v. *NLRB*, 126 F.3d 268 (4th Cir. 1997)—the primary case upon which petitioner relies (Pet. 8)—the court specifically noted that employee turnover is a relevant consideration in *Gissel* cases to the extent it is attributable to "normal attrition." 126 F.3d at 282. That holding cannot properly be extended to cases, like this one, in which employee attrition resulted from the unfair labor practice itself. *NLRB* v. *Gordon*, 792 F.2d 29, 34 (2d Cir.) (employee turnover "not a factor that mitigates against a [*Gissel*] bargaining order" where "caused by the very unfair labor practices sought to be remedied"), cert. denied, 479 U.S. 931 (1986). Indeed, such an extension would reward the employer for misconduct. Having succeeded in driving union employees from the firm through unfair labor practices, the employer could oppose an NLRB bargaining order on the ground that—because few victims of the unfair labor practices remain—a fair election can be held. Surely the Board acts within its discretion when it refuses to reward the employer for its unfair prac-

tices with an election to which the employer is not otherwise entitled. As this Court has explained, a Board remedy "which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board

FEBRUARY 1998